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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMIEN HILL, PETITIONER

V.

STATE OF GEORGIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Please Serve:

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QUESTION PRESENTED:

WHETHER AN ATTORNEY CAN UNILATERALLY DECIDE TO NOT PRESENT A DEFENDANT'S ONLY ALIBI WITNESS WHEN ALIBI IS THE SOLE DEFENSE BECAUSE HE, THE ATTORNEY, DETERMINED THAT THE ALIBI WITNESS WOULD COMMIT PERJURY.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *Damien Hill v. State*, A07A2127. A copy of this opinion is attached as Appendix "A," to this petition.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on March 7, 2008. This court has jurisdiction pursuant to United States Supreme Court Rule 12&13, over this matter as it is an appeal from the denial of the Georgia Supreme Court to exercise discretionary review of a holding of the Georgia Court of Appeals. The Georgia Supreme Court entered its order on June 2, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

STATEMENT

Damien Hill, Petitioner, was indicted, (along with two co-defendants, Patrick Noel and Carter Wright), by a Fulton county grand jury on two counts of armed robbery and two counts of possession of a firearm during the commission of a crime. The two co-defendants entered into plea agreements with the State and received an incarceration sentence of ten (10) years in exchange for testifying against Petitioner.

Petitioner maintained his innocence went to trial and on March 29, 2006, he was convicted on all counts and received a sentence of 30 years to serve - 10 years on counts 1&2 (Armed Robbery), to run consecutively, followed by 5 years on count 3, to run consecutive to counts 1&2, followed by 5 years on count 4, to run consecutive to counts 1,2&3. (T. pg 473, lines 4-18).

On June 9, 2005, Dennis Brady, was robbed at gun point in the parking deck of his apartment complex which is located at 1401 West Paces Ferry Road. (T. pg 294, lines 10-11) According to Brady he was "jumped" by two black men. (T. pg 295, lines 23-25) One of the men was wearing an orange jersey and the other had on a

black mask. (T. pg 300, line 13). When the men jumped him they produced a black handgun and held him at gunpoint. The suspect, wearing the orange jersey, then proceeded to go into Brady's pocket, remove a cellular phone, watch and wallet with his credit card and driver's license, inside. (T. pg 296, lines1-2,13).

Brady called the police and gave a general description of the get-away-vehicle, i.e, a burgundy bronco typed vehicle. (T. pg 296, line 25) Based upon this description a bolo was issued.

The Petitioner, while traveling on Pharr road approximately 50 yards from a Texaco Gas Station, (T. pg 383, line 2), pulled over when he was "blue lighted" by Officer Schmidt. (T. pg 383, lines 5-9). Petitioner was seized when Schmidt yelled "let me see your hands," (T. pg 204, lines 24-25), while simultaneously pulling his side arm, (T. pg 205, line 4) at the Texaco located at 345 Pharr Road. (T. pg 204, lines 15-16).

While the vehicle was stopped, Tim Mather, a victim in a robbery that occurred on June 8, 2005, stopped and stated "those are the same guys that robbed me last night." (T. pg 220, lines 4-5) Officer W. Crane then walked over to Mr. Mather and stated "we got em." Officer Crane then instructed Mr. Maher to go home and stand by for contact from a detective.

Tim Mather testified that on June 8, 2005 he and Thandi Seymore were leaving Club

Frequency, as they proceeded to walk up the hill of Boiling Way, they were "bumped into" by two gentlemen.(T. pg 242, lines 6-20) As they continued towards their vehicle which was located at the Hawkeye Fish and Tackle Shop, (T. pg 241, line 10), Seymore heard someone approach from the rear. (T. pg 243, lines 7-16) Seymore ran. Mather with his back towards the approaching men, (T. pg 243, line 2), turned to face a black male, wearing a jersey, holding a gun and another black male, wearing a black shirt and pants beside him. (T. pg 243, lines 12-16) The man in all black proceeded to go behind him and search the pockets of his pants. (T. pg 243, lines 14).

The robber took Mather's license, debit card, $40 in cash and a CD. (T. pg 243, lines 18-22) The suspects got into a vehicle and drove off. (T. pg 244, lines 14-16) According to Mather, they went towards Peachtree. (T. pg 245, line 3). Contrary to the State's trial theory of a three-man-team, Mather only described two men being involved and fleeing in a 1987 four-door Burundy Chevy Blazer. (T. pg 255, lines 12-13). As he told the 911 operator, he could not get the license plate number. (T. pg 255, line 12 -17).

Nor could Thandi Seymore get the tag number to wit: "Q. Did you get any part of a tag? A. No, no kind of line." (T. pg 256, lines 6-7). Later, Seymore claimed to see a Burgundy SUV but he could not get the license plate this time,

either to wit: "Q. Can you get the tag this time? A. No. they're too fast. Q. What? A. they're too fast." (T. pg 258, lines 11- 14)

This Petitioner was never identified as an assailant by either victim. Tim Mather claims to have recognized "those people" because of their outfits to wit: "Q. ... How is it you recognized those people? A. I recognized them because they had the same outfit on the night before." (T. pg 262, lines 8 -11)

Petitioner's trial counsel, Overton Thierry, was ill both before and during the trial to wit : Q: Okay. Do you believe the ailments that you were suffering from affected your ability to perform ...?"A."In a way I did, because I believe that during trial ... I was in intense pain ..."(T. 14).

It was for this reason, his illness, that Thierry's performance was admittedly deficient to wit:

> Q: "Okay. And my only question is, I understand you were suffering, you know, from your ailment. Do you believe that you should have requested a charge on alibi?
> A: "Yes"(T. Pg 16, lines 2-5)
> Q: "Okay"
> A: "Or Actually, usually Judge Goger would like to have his request to charge done and given to him at the time of jury selection. I had done that. And If I would have been — I think if I would have been – wouldn't have been taking the medication, I would have

> noticed even after my client had testified that I would have amended a request to charge to include an alibi"(T. Pg 16, lines 6-13)
> THE COURT: "Mr. Thierry, you're saying that because you were on some sort of medication, that you didn't request a charge for alibi? That's your testimony under oath? (T. Pg 16, lines 14-17)
> THE WITNESS: "Your honor, I'm saying that in the requlars course of representation, when I have an alibi defense or a client that's going to testify to alibi, I would normally request to do a jury charge for alibi." (T. Pg 16, lines 18-22)

REASON FOR GRANTING THE WRIT:

The Sixth Amendment's guarantee of "Assistance of Counsel" means effective counsel. *Strickland v. Washington*, 466 U.S. 668 (104 S. Ct. 2052, 80 L. Ed. 2d 674)(1984).

The Petitioner's counsel, in the case at hand, was ineffective in that he failed to present evidence of an alibi much less request a jury instruction on Petitioner's sole defense to the June 8, 2005 incident. His rational was the alibi witness would give false testimony. Yet , he never informed the Petitioner of his decision.

The Petitioner testified on direct that on the night of June 8, 2005, he was home with his fiance to wit: "Q. Did you go near Club Frequency on June 8? A. Never. I was at home with my

fiancé." (T. pg 390, lines 13 -14). He gave the same testimony on cross-examination to wit: "Q. You testified earlier that you were home with your fiancé on the evening of June 8, is that correct? A. Yes, Yes" (T. pg 391, lines 15-18).

Yet, Petitioner's trial counsel never called his finance, Lakrisha Huff, to testify at trial. Ms. Huff testified at the motion for new trial hearing that she was at home with the Petitioner on June 8th, 2005, the night Tim Mather was robbery by two armed men to wit:

> Q: "I want to call your attention to that specific date, June the 8th. Can you tell me whether or not you were at home that day?" A:"Yes";
> Q: "Okay. Now, was there anyone with you that day when you were at home?" A. "Yes";
> Q: "Who was that?" A: "Damien Hill." (MT. pg 5, lines 17-25)
> Q: "Damien Hill. Okay. Can you recall the hours that he was there with you?"
> A: "From 6:00 – He stayed there all night. He made it home at 6:00 from work, and he stayed all night" (MT. pg 6, lines 1-6)

Furthermore, she testified that she told the Petitioner's trial counsel Overton Thiery, that she was with the Petitioner during the time of

the alleged June 8th robbery, well in advance of trial to wit:

> Q: "All right. Now, Did you tell anyone else that Mr. Hill had been present with you on June the 8th? A:"Yes"
> Q: "And who was that?"A: "Overton Thiery." (MT. pg 6, lines 18 - 22)
> Q: "Okay. Do you remember how close to the actual commencement of the trial you told him that Mr. Hill was with you on the 8th?" A. "It was a week before the trial" (MT. pp 6- 7, lines 23-1)
> Q: "Were you ever called as a witness?" A: "No" (MT. pg 7, lines 8-10)

Nor did he list her as an alibi witness or notice the state in response to its demand for discovery that he would present alibi as a defense. Same constitutes ineffective assistance of counsel. *See Tenorio v. State*, 261 Ga. App. 609 (583 S.E.2d 269) (2003).

In *Tenorio*, John Howland was robbed by a man who pointed a pistol at his face, and said: "Give me the bag or I [will] kill you. Howland gave the gunman his briefcase, and the gunman waved him toward a hotel. Howland entered the hotel, but turned around in time to see the gunman jump into a gold car with a drive-out tag

occupied by a woman with long, blonde hair. According to Howland, the briefcase contained jewelry with a retail value of $ 250,000. Howland immediately reported the robbery to the police. He provided a description of the gunman's ethnicity, weight, height, hair color, and approximate age.

A few days later, the police received a tip regarding Tenorio and assembled a lineup of six photographs that included his picture. The investigating officer apparently delayed six weeks before sending the lineup to Howland, but eventually mailed it to his office in New York. Along with the lineup, the investigating officer included a letter, which instructed Howland as follows:

Look at all six photos. If you are 100 percent sure that one of the persons pictured is the perpetrator in this crime then simply place the number of the photograph which represents who you chose on the affidavit then sign and date it.

When Howland received the materials, he read the investigator's instructions, reviewed the lineup, and selected Tenorio's photograph. Howland testified that the officer did not indicate to him which picture to select, threaten him, or pressure him to choose any picture. He also testified that he was "100 percent" certain about the identification. At a motion to suppress his identification hearing, Howland further noted that the parking lot where the robbery occurred was well lit, he observed the robber's face for

approximately fifteen seconds, and, at one point during the robbery, he was two to three feet from the gunman.

At the time of the robbery, Tenorio worked at a grocery store in Tifton, which is approximately three and one-half hours away from Gwinnett County. The investigating officer conceded that it would be "physically impossible" for a person to be in Tifton one hour after committing a robbery in Gwinnett County.

In connection with his motion for new trial, Tenorio submitted the affidavits of two grocery store employees. Russell Clinton, the assistant store manager, testified that Tenorio telephoned him at approximately 10:30 p.m. on March 6, 2000, and reported that he had left work early that night following a dispute with Ooten. Richard Williams, one of Tenorio's co-workers, testified that he saw Tenorio arrive for his 10:00 p.m. to 6:00 a.m. shift, but that Tenorio left early following the dispute.

At the new trial hearing, trial counsel testified that Tenorio asked her to speak with "Mr. Russell," the assistant manager, about his alibi. She further testified that she sent an investigator, Larry Titshaw, to the grocery store to locate witnesses, but he did not bring her any names. Titshaw never contacted Clinton or Williams.

The Court ruled that, given the testimony, a reasonable possibility existed that, but for trial

counsel's deficient performance, the outcome of the trial would have been different. The State's case centered entirely around Howland's identification testimony. The investigating officer admitted at trial that no physical evidence tied Tenorio to the robbery. Police never located the jewelry, the gun, the getaway car, or the blonde accomplice. According to the investigating officer, "no evidence of the crime was found." The State's underwhelming evidence rendered the strength of Tenorio's alibi particularly crucial. Accordingly, Tenorio is entitled to a new trial.

Similarly, in the case at hand, the strength of Petitioner's alibi was particularly crucial, given that it was the sole defense.

CONCLUSION

For all of the reasons stated above Petitioner moves this Court to grant his writ of certiorari.

Respectfully submitted

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PETITION FOR A WRIT OF CERTIORARI

APPENDIX "A"

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IN THE COURT OF APPEALS FOR GEORGIA

A07A2127 , HILL V. STATE

March 7, 2008

RUFFIN, JUDGE.

Damien Hill was found guilty of two counts of armed robbery and two counts of possessing a firearm during the commission of a felony. In thirteen enumerations of error on appeal, Hill: challenges the sufficiency of the evidence for one count of armed robbery and one count of possessing a firearm during the commission of a felony; objects to the trial court's denial of his motion to suppress; objects to the denial of his motion for new trial on the basis of newly acquired evidence; objects to the failure to charge the jury as to alibi; and alleges that he received ineffective assistance of counsel. Finding no error, we affirm.

1. On appeal from a criminal conviction, we view the evidence in a light most favorable to the jury's verdict, and we neither weigh the evidence nor evaluate witness credibility[1].We uphold the verdict "if any rational trier of fact co.ld have found the essential elements of the

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[1] *Forde v. State*, 277 Ga. App. 410 (626 S. E. 2d 606)(2006)

crime beyond a reasonable doubt."[2] Viewed in this manner, the record shows that Hill drove Carter Wright and Patrick Noel to the Buckhead area of Atlanta in Hill's vehicle on June 8, 2005. Wright and Noel approached two men walking down the street; Noel pointed a gun at one of the men, Tim Mather, while Wright went through Mather's pockets and took his cellular telephone and wallet. Noel testified that the gun he used was given to him by Hill. Wright and Noel fled in the vehicle driven by Hill. The victims identified the perpetrators as two men, one wearing all black and the other wearing an orange basketball jersey, and the vehicle as a burgundy four door Chevrolet Blazer with a wildlife tag that was driven by a third man. The next day, June 9, Hill, Wright, and Noel discussed that they "[were not] satisfied by what took place the first night" and decided to go to an apartment complex in Buckhead "where [they] could obtain some funds and be satisfied." Hill drove Wright and Noel to the apartment complex in his vehicle. In the complex's parking deck, Wright and Noel approached Dennis Brady and a woman; Noel pointed a gun at them while Wright went through their pockets. Brady's cellular telephone, wallet, and watch were taken. One of the perpetrators was dressed all in black and wearing a black ski mask, while

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[2] (Punctuation Omitted) Id. at 411.

the other was wearing an orange jersey. Wright and Noel returned to Hill's vehicle and told him what had transpired because "[Hill] was anxious to hear what happened. He wanted to know how much money we got or how much he got out of doing what we did." Brady contacted police immediately and they issued a "be on the lookout" for a burgundy Chevrolet Blazer or GMC Jimmy[3] with a wildlife tag with three male passengers. Approximately 25 minutes after Brady notified police, Hill's vehicle was stopped at a gas station in Buckhead with all three men inside. A handgun, a black ski mask, and Brady's driver's license, credit cards, and cellular telephone were inside the vehicle. Hill was driving the vehicle, which was a burgundy GMC Jimmy with a wildlife tag. Noel was wearing an orange jersey, and Wright was dressed entirely in black. Mather, one of the victims in the June 8 robbery, drove by the gas station after police stopped Hill, Wright, and Noel. Mather, recognizing the vehicle, ran toward it, saying, " 'that's the people that robbed me last night.' " He recognized Wright and Noel because they were wearing the same clothes as when they robbed him, and he

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[3] Exemplar photographs of both vehicles were entered into evidence and testimony was given that they are "essentially the same car," and "it is common for people to get those two vehicles confused with each other."

identified the vehicle as the one used by his assailants. Brady, the victim of the robbery earlier that evening, was brought to the scene; he identified Wright and Noel as the persons who had robbed him and Hill as wearing the same clothes as the getaway driver. At trial, Wright and Noel testified that Hill was a knowing participant with them in both armed robberies as the driver of the vehicle. Hill testified that he was at home on the evening of June 8 and was not with Wright and Noel in Buckhead. He admitted that he drove Wright and Noel to Buckhead on the evening of June 9, but denied that they went to an apartment complex or committed a robbery. After the trial, Wright wrote a letter in which he recanted his trial testimony against Hill. Hill argues that the evidence was insufficient to find him guilty of the June 8 armed robbery and firearm possession charges because the only evidence linking him to the crimes was the testimony of his two co-defendants. While a defendant may not be convicted on the uncorroborated testimony of an accomplice to the crime, " '[s]light evidence from an extraneous source identifying the accused as a participator in the criminal act will be sufficient corroboration of the accomplice to support a verdict.'[4] Corroborating evidence may be circumstantial,

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[4] *Williams v. State*, 280 Ga. 584, 586(1)(630 SE2d 370)(2006).

and the sufficiency of the corroborating evidence is for the jury to determine.[5] Initially, we note that "[t]he testimony of one accomplice may be used to corroborate that of another."[6] Both Wright and Noel testified as to Hill's participation in the events of June 8, which was sufficient evidence to find Hill guilty of the crimes with which he was charged.[7] Moreover, there was additional evidence corroborating the accomplices' testimony. The victims confirmed that they had been robbed and testified that the gun used and the getaway vehicle were similar to Hill's gun and vehicle, and that the vehicle was driven by a third man. This evidence was sufficient to corroborate the accomplice testimony and allow a rational trier of fact to find Hill guilty of the crimes charged.[8]

2. Hill argues that the trial court erred in failing to give a jury instruction on the defense of alibi. Hill did not request an instruction on alibi, and it is generally not error for a trial court to fail to charge on alibi if there has been

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[5] See *Bearden v. State*, 275 Ga. App. 378, 379(2)(620 SE2d 613)(2005).

[6] *Williams*, supra .

[7] See id.

[8] See *Bearden*, supra at 380-381 (3); *Zeigler v. State*, 270 Ga. App. 787, 789(1)(680 SE2d 230) (2004).

no request, even if alibi is the sole defense.[9] This is so because alibi is not an affirmative defense; since the true effect of an alibi defense is to traverse the [S]tate's proof that the defendant committed the crime, the charge that the burden is on the state to prove that the defendant committed the crime beyond a reasonable doubt itself necessarily covers the question of whether the evidence of alibi was sufficient to create a reasonable doubt.[10] In this case, the trial court fully charged the jury on the burden of proof, reasonable doubt, and the presumption of innocence. While Hill testified that he was never in Buckhead on the evening of June 8, "[t]he absence of a charge on alibi did not change the fact that no juror who believed [Hill's] testimony could find that the [S]tate had carried its burden of proof."[11] Accordingly, the trial court did not err in failing to charge the jury on alibi absent a request from Hill.[12]

3. Hill objects to the trial court's failure to

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[9] See *Matthews v. State*, 285 Ga. App. 859, 862(2)(648 SE2d 160)(2007).

[10] (Punctuation omitted.) Id.

[11] *Rivers v. State*, 250 Ga. 288, 300(8)(298 SE2d 10)(1982).

[12] See id.

grant his motion to suppress impermissibly suggestive witness identification. We will uphold a trial court's ruling on a motion to suppress if there is any evidence to support it, and we construe the evidence favorably to the trial court's findings.[13] Hill contends that Mather's "viewing [Hill] on the side of the road surrounded by police officers, with another man, who had 'dreads,' coupled with a police officer acknowledging 'we got em,' tainted [Mather's] identification of [Hill] as one of the guys that robbed him." But Mather never identified Hill; he only identified Wright and Noel as the men who had robbed him the previous night and identified Hill's vehicle as the getaway vehicle.[14]And Mather made the identification sua sponte, not as part of any lineup or showup orchestrated by the police.[15]

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[13] See *Underwood v. State*, 266 Ga. App. 119, 120 (596 SE2d 425)(2004).

[14] See, e.g., *In the Interest of B.M.*, 252 Ga. App. 716, 720(2)(556 SE2d 883)(2001)(one does not have standing to assert that another's right to due process has been violated).

[15] See *Dunn v. State*, 262 Ga. App. 643, 645(2)(586 SE2d 352)(2003)(where allegedly suggestive identification was not set up by police, but occurred through witness's personal observation, the defendant's due process rights were not violated and the issue is one of witness credibility).

Under these circumstances, we find no error in the trial court's denial of Hill's motion to suppress.[16]

4. Hill alleges that he is entitled to a new trial because, after he was found guilty, Wright wrote a letter in which he recanted his trial testimony that they were involved in the crimes. In general, a post-trial recantation of his trial testimony by the State's witness is not grounds for a new trial unless the witness has either been convicted of perjury or "there can be no doubt of any kind that the State's witness'[s] testimony in every material part is purest fabrication."[17] There is no evidence in the record that Wright was convicted of perjury, and in light of the substantially similar testimony of Noel, the other accomplice, as well as the ample circumstantial evidence of Hill's involvement, we cannot say that Wright's testimony was undoubtedly fabricated.[18] The

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[16] See *Callahan v. State*, 280 Ga. App. 323, 329(2)(a)(634 SE2d 102)(2006)(there can be no error in failing to suppress allegedly suggestive information when no harm is shown).

[17] (Punctuation omitted.) *Askew v. State*, 254 Ga. App. 137, 141(5)(564 SE2d 720)(2002).

[18] See id.; *Sanders v. State*, 242 Ga. App. 743,744(2)(531 SE2d 170)(2000); *Johnson v. State*, 236 Ga. App. 764, 765(1)(513 SE2d 291)(1999).

trial court did not err in denying Hill's motion for a new trial on this basis.[19]

5. In his remaining enumerations of error, Hill alleges that the trial court erred in denying his motion for a new trial on the basis of ineffective assistance of counsel. In order to establish that he received ineffective assistance of counsel, Hill "must show both that counsel's performance was deficient and that the deficient performance was prejudicial to his defense."[20] There is a "strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct," and we must affirm the trial court's decision on this issue unless it is clearly erroneous.[21]

(a) Hill contends that trial counsel was ineffective in failing to move to sever the trial of the crimes that occurred on June 8 and June 9. At the hearing on Hill's motion for a new trial, trial counsel testified that he conferred with other attorneys in his office and made a strategic decision not to file a motion to sever. "The failure to file a motion to sever does not

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[19] See *Sanders*, supra.

[20] *Young v. State*, 280 Ga. 65,69 (11)(623 SE2d 491)(2005).

[21] (Punctuation omitted.) *Davis v. State*, 267 Ga. App. 245, 246(1)(599 SE2d 237)(2004).

require a finding of ineffective assistance since the decision whether to seek severance is a matter of trial tactics or strategy, and a decision amounting to reasonable trial strategy does not constitute deficient performance."[22] Moreover, the crimes are sufficiently similar that evidence of one offense would be admissible in the trial of the other offenses if they were tried separately.[23] Thus, a motion to sever likely would have been futile.[24] Trial counsel's strategic decision on this issue cannot support a claim of ineffective assistance of counsel.[25]

(b) Hill asserts that trial counsel was ineffective because he failed "to raise double jeopardy as a bar to [Hill] being punished for the same crime twice." Hill appears to be arguing that he should not have been sentenced for two counts of armed robbery or two counts of possessing a firearm during the commission

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[22](Citation and punctuation omitted.) *Harris v. State*, 279 Ga. 522,529(6)(615 SE2d 532)(2005).

[23]See *Lee v. State*, 281 Ga. App. 479,483-484(3)(636 SE2d 547)(2006), *Berry v. State*, 274 Ga. App. 366, 371-372(3)(a)(618 SE2d 72)(2005).

[24] See *Berry*, supra at 372.

[25] See *Smith v. State*, 269 Ga. App. 133, 142(4)(d)(603 SE2d 445)(2004).

of a felony because only one gun was entered into evidence at trial. We find this argument completely without merit.[26]

(c) Hill alleges that trial counsel should have objected to the sentences entered by the trial court on the two counts of possessing a firearm during the commission of a felony, because Hill's sentence for Count 3 (possessing a firearm) was to run consecutively to Counts 1 and 2 (armed robbery), and his sentence for Count 4 (possessing a firearm) was to run consecutively to Counts 1, 2, and 3. We find the sole case cited by Hill does not require a different sentence,[27] and conclude that Hill was properly sentenced.[28] Trial counsel's failure to object to the sentencing therefore cannot constitute ineffective assistance of counsel.[29]

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[26] See *Braithwaite v. State*, 275 Ga. 884, 888(8)(572 SE2d 612)(2002).

[27] See *Busch v. State*, 271 Ga. 591 (523 SE2d 21)(1999).

[28] See *Owens v. State*, 271 Ga. App. 365,368-369(3)(609 SE2d 670)(2005); *Braithwaite*, supra at 888-889(9).

[29] See *McCoy v. State*, 285 Ga. App. 246,249(4)(b)(645 SE2d 728)(2007)("[F]ailure to make a meritless argument does not constitute ineffective

(d) Hill next argues that trial counsel was ineffective because he did not move to suppress evidence obtained as a result of the stop of Hill's vehicle until after the jury had been selected and opening arguments concluded, and thus the motion was untimely. He contends that "had the motion to suppress been filed, it would have been granted or at the very least the denial of it would have preserved the issue for appeal." But the record reflects that, more than two weeks before trial, trial counsel did file a written motion to suppress all evidence obtained as a result of the stop of Hill's vehicle. The trial court heard evidence on the motion before the start of trial and denied it. As this enumeration is not supported by the record, it necessarily provides no basis for a claim of error.[30]

(e) Hill alleges that trial counsel was ineffective because he failed to request a jury charge on the lesser included offense of robbery or theft by taking. Hill argues that such a charge would have been appropriate because Hill himself did not brandish a gun. This argument betrays a fundamental misunderstanding of the basis for Hill's convictions for armed robbery. Hill could

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assistance of counsel.").

[30] See *Higgins v. State*, 251 Ga. App. 175,178(3)(554 SE2d 212)(2001).

be convicted of armed robbery as a party to the crimes even though he himself was not the individual who actually pointed the gun at the victims and took their possessions.[31] And failure to ask for a charge on a lesser included offense can be a matter of trial strategy.[32] There was no testimony on this issue at the motion for new trial hearing; accordingly, Hill has "made no affirmative showing that the purported deficiencies in his trial counsel's representation were indicative of ineffectiveness and were not examples of a conscious and deliberate trial strategy," and his claim of ineffective assistance fails.[33]

(f) Hill contends that trial counsel should have made a hearsay objection to the testimony of a police officer as to what Mather, the victim of the June 8 robbery, told him about the incident. Because Mather, as well as other witnesses, testified at trial to the same events that the officer discussed, the admission of the officer's

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[31] See *Cantrell v. State*, 230 Ga. App. 693,695(1)(498 SE2d 90)(1998)(driver of getaway car convicted of armed robbery).

[32] See *Trans v. State*, Ga. App. (3)(Case No. A07A1953, decided Jan. 4, 2008).

[33] (Punctuation omitted) Id.

testimony was harmless.[34] "The erroneous admission of hearsay is harmless where, as here, legally admissible evidence of the same fact is introduced. In such a case, the hearsay is cumulative and without material effect on the verdict."[35] Without a showing of harm, Hill's claim of ineffective assistance of counsel on this basis fails.[36]

(g) Hill alleges that trial counsel was ineffective in failing to object to the testimony of a police officer that it is common for people to confuse the Chevrolet Blazer and the GMC Jimmy, because this testimony impermissibly bolstered the testimony of the two victims of the June 8 robbery. Hill's vehicle was a GMC Jimmy. At trial, one victim of the June 8 robbery testified that he told police the getaway vehicle was a Chevrolet Blazer, but he was unable to determine if it was a Blazer or a Jimmy because he saw the side and rear of the vehicle, and "[t]he only way to tell [the difference] is the grill." He later identified Hill's vehicle as the getaway vehicle. The other victim testified that he told police the getaway vehicle

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[34] See *Morris v. State*, 280 Ga. 179,180(3)(a)(626 SE2d 123)(2006).

[35] (Punctuation omitted.) Id.

[36] See *Dillard v. State*, 272 Ga. App. 523, 528(6)(612 SE2d 804)(2005).

was "a burgundy or a red type of Jimmy, like a truck."" 'Improper bolstering refers to character evidence intended to show a witness'[s] veracity, that is, his tendency to tell the truth.'"[37] It is not improper bolstering, however, for a witness to "express an opinion as to whether ... objective evidence in the case is consistent with the victim's story."[38] Under these circumstances, where the police officer's testimony was not a commentary on the witnesses' veracity but rather evidence of an objective fact — that the exteriors of the Chevrolet Blazer and GMC Jimmy differ only in their badging — we do not find that this testimony impermissibly bolstered the credibility of the witnesses. "Because the [officer's] testimony was not improper bolstering, [Hill's] attorney was not ineffective in failing to raise such an objection to it."[39]

(h) Hill's next claim of ineffective assistance arises from trial counsel's failure to object during the State's closing argument to statements challenging Hill's veracity. There is,

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[37] *Goldey v. State*, Ga. App. (2)(a)(Case No. A07A2119, decided Jan. 16, 2008).

[38] *Chauncey v. State*, 283 Ga. App. 217,220(3)(641 SE2d 229)(2007); see *Ross v. State*, 262 Ga. App. 323, 324-325 (1)(585 SE2d 666)(2003).

[39] *Goldey*, supra.

however, "wide leeway given to argue all reasonable inferences that may be drawn from the evidence during closing argument," and this leeway "encompasses pointing out inconsistencies in a defendant's testimony and urging that, on that basis, the defendant lied."[40] While the State did describe Hill's testimony as "unbelievable" several times, it also told the jury "[y]ou are the judges of the credibility of the testimony of the witnesses" and stated "[Hill] wants you to believe" the testimony described as unbelievable. Taking the State's closing argument as a whole, the State argued that, based on the evidence and reasonable deductions therefrom, the jury should conclude that Hill was lying.[41] As such argument is permissible, trial counsel's failure to object to it cannot serve as the basis for an ineffective assistance claim in this instance.[42]

(i) Hill asserts that trial counsel was ineffective in failing to call Hill's fiancée as an alibi witness because she would have testified that Hill was with her at the time of the June 8

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[40] *Appling v. State*, 281 Ga. 590,592-593(5)(642 SE2d 37)(2007).

[41] See *Emberson v. State*, 271 Ga. App. 773,775(3)(611 SE2d 83)(2005).

[42] See *Harris v. State*, 283 Ga. App. 374, 384(4)(d)(641 SE2d 619)(2007).

robbery. At the motion for new trial hearing, trial counsel explained that Hill first said that an unidentified woman with whom he had been on the telephone that night could provide an alibi. At that time, Hill told trial counsel that he had been alone in his apartment on June 8. Then, the week before trial, Hill's fiancée told trial counsel that she had been with Hill that night. Trial counsel did not present Hill's fiancée as an alibi witness because he "had concerns about perjured testimony at that point." The decision not to call an alibi witness who may perjure herself is a reasonable trial strategy, as well as an ethical obligation.[43] "As trial counsel is precluded from assisting his client in presenting perjured testimony, we reject [Hill's] claim that his attorney was ineffective on that basis."[44]

(j) Finally, Hill contends that trial counsel's failure to request a jury instruction on alibi constitutes ineffective assistance of counsel. Trial counsel testified at the motion for new trial hearing that he should have requested a charge on alibi. But in light of our holding in Division 2, we conclude that Hill cannot show a

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[43] See *Nelson v. State*, 242 Ga. App. 63,66(8)(528 SE2d 844)(2000).

[44] (Punctuation omitted.) *Grooms v. State*, 261 Ga. App. 549, 551(3)(a)(583 SE2d 216)(2003).

reasonable probability the giving of an alibi instruction would have changed the outcome of the trial, and this claim for ineffective assistance fails.[45]

Judgment affirmed. Blackburn, P. J., and Bernes, J., concur.

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[45] See *Springs v. Seese*, 274 Ga. 659,661(3)(558 SE2d 710)(2002).

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: June 2, 2008

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Case No. S08C1074

DAMIEN HILL V. THE STATE

COURT OF APPEALS CASE NO. A07A2127

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk